North Hills Office Services, Inc. *and* Service Employees International Union, Local 32B-J, AFL–CIO. Cases 29–CA–25715, 29–CA–25716, 29–CA–25717, 29–CA–25752, 29–CA–25929

July 13, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 15, 2004, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief to which the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) of the Act when:

> field supervisor José Herrera, during the first week of May 2003,[4] directed employee Pilar Gutierrez not to speak with Union organizers;
>
> Vice President Tom Pellegrino, during a mandatory meeting on May 8, coercively interrogated employees about their Union activities,[5] solicited employee grievances, and promised employees benefits for not supporting the Union;
>
> Herrera and Operations Manager Eddie Matos, for discriminatory reasons, demanded that employee José Labrador provide them with copies of his birth certificate and social security card on June 12;
>
> two of the Respondent's supervisors engaged in surveillance of employees' Union activities at a local restaurant on June 13;[6]

[1] During the hearing, employee Balmore Guevara testified on direct examination regarding work authorization paperwork he submitted to the Respondent. During the Respondent's cross-examination of Guevara about those documents, the Charging Party's attorney objected to the relevancy of the questions and advised Guevara not to answer potentially incriminating questions about his work authorization papers. Guevara then declined to answer further questions. The Respondent then moved to strike the entirety of Guevara's direct testimony, arguing that Guevara's testimony should be stricken because he failed to answer cross-examination questions within the scope of his direct testimony. The Respondent also argued that Guevara had waived his Fifth amendment privilege against self-incrimination by submitting an affidavit concerning his work authorization paperwork during the investigation stage of the case to the Board and by testifying about those documents while on direct examination. The judge did not rule on the Respondent's motion either during the hearing or in his decision. The Respondent excepted to the judge's failure to do so.

In adopting the judge's findings of violations in this case, we disregard Guevara's testimony because it is not necessary to support those violations. The credited testimony, documentary and circumstantial evidence present in the record are sufficient to support our findings of violations even absent Guevara's testimony. Thus, it is not necessary to reach the issues presented by the Respondent's motion.

We note that Sec. 102.31(c) of the Board's Rules and Regulations sets forth the procedures parties should employ when a witness either has refused or is expected to refuse to testify or provide other information on the basis of the Fifth amendment privilege against self-incrimination.

[2] The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also modify the judge's recommended Order to provide the affirmative requirement that the Respondent remove from its records any references to the unlawful warnings and discharge of Guevara. *Sterling Sugars*, 261 NLRB 472 (1982). We shall also modify the judge's recommended Order to conform it to the Board's usual remedial provisions for the violations found herein and additionally substitute a new notice to conform it to the language of the Order.

[4] All dates refer to 2003 unless otherwise indicated.

[5] In light of this finding, we find it find it unnecessary to pass on the allegation that, during the first week of May, Herrera coercively interrogated Gutierrez about whether she (Gutierrez) had given contact information to the Union. Such a finding would be cumulative of this violation and would not materially affect the remedy.

Chairman Battista and Member Schaumber agree that Pellegrino's questioning of employees was unlawful, under all the circumstances. They do not rely on the judge's finding that the questioning was inherently coercive.

[6] In making this finding, the judge relied on an adverse inference against the Respondent for its failure to call Building Supervisor Ronnie Hernandez, who was present outside of the restaurant where the union meeting took place, to testify and corroborate Herrera's testimony concerning the reason for the supervisors' presence. We do not rely on the judge's adverse inference in adopting his finding of a violation because the credited testimony regarding this allegation is sufficient to support a finding that the supervisors were present to observe the union meeting.

We find it unnecessary to pass on any implication in the judge's decision that drawing such an inference here is mandatory. See, e.g., *McCormick on Evidence* at § 272 (3d ed. 1984) (stating that adverse inference *may* be drawn in these circumstances).

Matos, during a mandatory employee meeting on June 16, coercively interrogated employees about their Union activities,[7] created an impression of surveillance, threatened employees with futility for supporting the Union,[8] and impliedly threatened employees with job loss for supporting the Union;

Herrera demanded that employee Balmore Guevara present work authorization papers to him on June 24;

it created an impression of surveillance[9] and threatened job loss in its July 1 newsletter, "Plain Talk";[10] and when

Matos impliedly threatened Gutierrez with bodily harm on July 1 because of her Union activities.

2. The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(3) and (1) of the Act when:

it discharged Gutierrez on July 1;[11]

Herrera issued Guevara a written warning on June 24 regarding his work performance[12] and discharged him on July 3;

Matos issued Labrador a written warning for being late to work on or about June 23;[13]

Herrera issued Labrador a written warning on June 24 for talking to co-workers while standing outside of the supply closet and suspended him later that evening; and when

it issued Labrador a written warning on August 1.

3. Finally, we reverse the unfair labor practice finding made by the judge regarding the Respondent's alleged reduction of its July 1 discharge of Gutierrez to a verbal warning. As noted above, the Respondent reinstated Gutierrez on July 2. Upon Gutierrez' return to work, Pellegrino said "there was nothing against her." Pellegrino also said that he wanted Gutierrez to continue working and that she was a good employee. Matos then apologized for discharging Gutierrez the evening before and said that he did not realize he was required to give notices or warnings before he could discharge her.

The judge found that Matos' statement about having to give Gutierrez notices or warnings before he could discharge her indicated to Gutierrez that her discharge was being reduced to a verbal warning. We disagree. Matos' restatement of the Respondent's discipline policies cannot reasonably be construed as a verbal warning in light

[7] Chairman Battista and Member Schaumber agree that Matos' questioning of employees was unlawful under all the circumstances and would not rely on the judge's finding that the questioning was inherently coercive.

[8] In light of this finding, we find it unnecessary to pass on the allegation that Pellegrino unlawfully threatened employees with futility for supporting the Union on May 8. Such a finding would be cumulative of this violation and would not materially affect the remedy.

[9] Member Schaumber does not pass on whether the "Plain Talk" newsletter created an impression of surveillance because such a finding would be cumulative of other violations found and would not materially affect the remedy.

[10] Chairman Battista and Member Schaumber do not rely on any implication in the judge's decision that the Respondent violated Sec. 8(a)(1) by issuing its September 22 "Plain Talk" newsletter. The consolidated complaint did not allege that letter to be a violation of the Act. Additionally, Chairman Battista and Member Schaumber find it unnecessary to pass on the judge's comments that this letter demonstrated the Respondent's animus towards the Union.

[11] On July 1, Pellegrino told Gutierrez that she was being discharged because she had endorsed and deposited another employee's paycheck in her account. The Respondent reinstated Gutierrez on July 2 and, among other things, told her that the issue with the paychecks had been investigated and "there was nothing against her." The judge found that the Respondent had not effectively repudiated the unfair labor practice as required by *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Without necessarily agreeing with all the elements of *Passavant*, Chairman Battista and Member Schaumber agree that the Respondent's conduct failed to effectively repudiate its unlawful discharge of Gutierrez.

[12] In adopting the judge's finding that the warning violated Sec. 8(a)(3), Chairman Battista and Member Schaumber do not rely on the adverse inference drawn by the judge against the Respondent for its failure to call Guevara's immediate supervisor to testify concerning the written warning. They rely on the following: The credited evidence indicates that the warning was issued without any prior verbal warnings, in violation of the Respondent's policy requiring that verbal warnings precede any written warning for poor performance. Mindy Levy, Respondent's controller, testified that supervisors always speak to an employee about performance problems before issuing a written warning. Although not mentioned by the judge in his decision, Levy also testified that the Respondent had a practice of referring to prior warnings in a subsequent written warning, if the supervisor was aware of any. Other written warnings, including warnings issued by Herrera, reflect this practice. The written warning issued to Guevara does not mention any prior verbal warnings. This evidence is sufficient to support the judge's finding that Guevara did not receive prior verbal warnings, and his finding that the written warning was pretextual, without regard to the adverse inference drawn by the judge.

Member Liebman would additionally rely on the timing of Guevara's warning and the numerous other found violations that evidence the Respondent's significant antiunion animus.

[13] In making this finding, the judge credited Labrador's testimony that he received a warning on June 23. Labrador also credibly testified that he had not seen the written warning, which was dated June 18, prior to the hearing.

The judge also relied on an adverse inference against the Respondent for its failure to produce sign-in sheets from the security station in the building where Labrador worked. The sign-in sheets, however, were not under the control of the Respondent, and when it attempted to obtain them, it was told that the documents no longer existed. Consequently, we do not rely on the judge's adverse inference, because drawing one in these circumstances is not appropriate. *Cf. Champ Corp.*, 291 NLRB 803, 803–804 (1988), enfd. 933 F.2d 688 (9th Cir. 1990) (adopting judge's decision to not draw adverse inference where documents not in existence).

of Pellegrino's contemporaneous statement to Gutierrez that "there was nothing against her." Accordingly, we shall dismiss this complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, North Hills Office Services, Inc., Woodbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees, suspending its employees, issuing its employees warnings or imposing any other discipline in order to discourage its employees' membership in, or activities on behalf of, Service Employees International Union, Local 32B-J, AFL–CIO, herein the Union, or any other labor organization.

(b) Demanding that its employees provide birth certificates, social security cards or any other documents establishing that they are legally entitled to work in the United States solely to discourage their membership in, or activities on behalf of the Union, or any other labor organization.

(c) Impliedly threatening to discharge its employees, or threatening to harm them, or in any other manner threatening them in order to discourage its employees' support for, or their membership in, or activities on behalf of the Union, or any other labor organization.

(d) Coercively interrogating its employees about their activities on behalf of or their attendance at meetings held by the Union, or any other labor organization.

(e) Surveilling its employees or giving the impression of surveillance of their activities on behalf of the Union, or any other labor organization.

(f) Soliciting its employees' grievances and promising to remedy them in order to discourage their support for the Union or any other labor organization.

(g) Directing its employees not to speak to representatives of the Union, or any other labor organization.

(h) Threatening its employees that choosing the Union or any other labor organization as their collective-bargaining representative would be futile.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to Pilar Gutierrez' discharge on July 1, 2003, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(b) Within 14 days from the date of this Order, remove from its files any reference to Balmore Guevara's warning on June 24, 2003, and his discharge on July 3, 2003, and within 3 days thereafter notify him in writing that this has been done and that the warning and discharge will not be used against him in any way.

(c) Make whole José Labrador for his unlawful suspension, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to José Labrador's suspension on June 24, 2003, and the warnings issued to him on June 23, 24, and August 1, 2003, and within 3 days thereafter notify him in writing that this has been done and that the suspension and warnings will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its principal office and place of business located at 244 Crossways Park Drive West, Woodbury, New York; and at its other facilities located at 265 Broad Hollow Road, 425 Broad Hollow Road and 445 Broad Hollow Road, copies of the attached Notice marked "Appendix"[14] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the first week of May 2003.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 13, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fire you, suspend you, issue you warnings, or impose any other discipline upon you to discourage your membership in or activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT demand that you provide us with birth certificates, social security cards, or any other documents establishing that you are legally entitled to work in the United States solely to discourage membership in or activities on behalf of the Union or any other labor organization.

WE WILL NOT impliedly threaten to fire you or threaten to harm you or in any manner threaten you in order to discourage your support for, or membership in, or activities on behalf of the Union, or any other labor organization.

WE WILL NOT coercively interrogate you about your activities on behalf of or your attendance at meetings held by the Union, or any other labor organization.

WE WILL NOT spy on you or give you the impression that we are spying on your activities on behalf of the Union, or any other labor organization.

WE WILL NOT ask you to tell us about complaints you have concerning your job and promise to remedy them in order to discourage your support for the Union, or any other labor organization.

WE WILL NOT direct you not to speak to representatives of the Union, or any other labor organization.

WE WILL NOT threaten you that selecting the Union, or any other labor organization, as your collective bargaining representative would be futile.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of the rights stated above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Pilar Gutierrez' discharge on July 1, 2003, and WE WILL, within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Balmore Guevara's warning on June 24, 2003 and his discharge on July 3, 2003 and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the discharge and warning will not be used against him in any way.

WE WILL make whole José Labrador for any loss of pay he may have suffered as a result of our discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to José Labrador's suspension on June 24, 2003, and the warnings we issued him on June 23, 24, and August 1, 2003 and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the suspension and warnings will not be used against him in any way.

NORTH HILLS OFFICE SERVICES, INC.

Amy J. Gladstone, Esq., for the General Counsel.
Alan Pearl, Esq. (Portnoy, Messinger, Pearl & Associates), for the Respondent.
Katchen Locke, Esq., for the Union.

DECISION

STATEMENT OF THE FACTS

Background

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on April 20, 21, 22, and May 18, and 19, 2004 in Brooklyn, New York. Pursuant to charges filed by Service Employees International Union, Local 32B-J, AFL–CIO (Local 32B-J or the Union), against North Hills Office Services, Inc. (Respondent), a consolidated complaint issued on December 17, 2003, alleging various violations of Section 8(a)(1) and (3) of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses, set forth in detail below, and a full consideration of the briefs filed by counsel for the General Counsel, counsel for the Union and counsel for Respondent, I make the following findings of fact, and conclusions of law.[1]

FINDINGS OF FACT

At all times material, Respondent is a domestic corporation with its place of businesses in Woodbury, New York, and with various other facilities located throughout Long Island, New York. Respondent is engaged in wholesale subcontracting of office cleaning and maintenance services. Respondent annually purchases and receives at its facilities goods and supplies, valued at in excess of $50,000 directly from suppliers located outside the State of New York. It is admitted that the employer is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also admitted that Local 32B-J is a labor union within the meaning of Section 2(5) of the Act.

It is also admitted Thomas Pellegrino Jr., vice president of operations, Eddie Matos, operations manager, José Herrera, operations supervisor, Leticia Herrera, building supervisor, Ronnie (LNU), building supervisor, and Mindy Levy, controller/human resources, are supervisors, within the meaning of Section 2(11) of the Act.

Respondent is a subcontractor providing cleaning services to various buildings located throughout Long Island and New Jersey, including buildings located at 265 Broad Hollow Road, herein called 265, 425 Broad Hollow Road, herein called 425, and 445 Broad Hollow Road, herein called 445, in Melville, New York. 445 and 425 share an entranceway, while 265 is around ½ a mile away from the other two buildings. At all material times, José Herrera has been employed as Respondent's field supervisor in charge of 265, 425, and 445. Additionally, Rene Iraheta has been employed as Respondent's building supervisor for 265; Laticia Herrera, José Herrera's wife, has been employed as Respondent's building supervisor for 425; and Ronnie Hernandez has been employed as Respondent's building supervisor for 445.

The cleaners employed by Respondent are presently represented by National Organization of Industrial Trade Union, (called NOITU), and have been so represented for many years. The most recent collective bargaining agreement between Respondent and NOITU was in force from October 18, 2000 to November 23, 2003.

Union's Activities Commence

In early May 2003, Local 32B-J began a campaign attempting to organize Respondent's employees who work at 265, 425 and 445. During that month, Local 32B-J organizers, including Ericka Bozzi and Ruben Sanchez, situated themselves in the parking lot outside of 445 three to four times, from 5:30 p.m. to 6 p.m. and 9:30 p.m. to 10 p.m. While there, they wore purple T-shirts containing white letters that said, "Local 32B-J." The Local 32B-J organizers stood around 100' to 150' from the entrance to 445 and spoke to Respondent's employees as they were arriving at and leaving from work. I conclude Respondent was aware of these activities. After speaking with Bozzi and Sanchez, some of Respondent's employees offered to assist the Local 32B-J representatives with their organizing campaign. The employees who most actively provided organizing assistance to Local 32B-J were: Pilar Gutierrez, José Labrador, Balmore Guevara, and Walter Gutierrez. Each one of these employees attended Local 32B-J meetings, visited coworkers in their homes, and participated in press conferences on behalf of Local 32B-J.

During the first week of May, employee Pilar Gutierrez spoke to Local 32B-J representative Bozzi outside of 445 on her way in to work. Later that same night, Gutierrez was taking the garbage out at around 7 p.m., when her supervisor's supervisor, field supervisor, José Herrera, approached her and commented, "You gave your name and address and your telephone number to those people in the union." Gutierrez replied, "Yes." Herrera then told her, "Those people will not let you live in peace. They will constantly call you and visit you." Gutierrez responded, "We meet and I'm not afraid of anything and I've never done anything to anyone." Herrera advised Gutierrez that she was not supposed to speak to "those people from the union because they were from 'another union.'" He told her, "That's all I'm telling you" and left.

On May 8, after Vice President, Tom Pellegrino was made aware that Local 32B-J was attempting to obtain authorization cards from Respondent's employees, Pellegrino held a meeting for the 16 night shift employees working at 445 at that time. In addition to Pellegrino, supervisors Herrera, who was translating Pellegrino's words into Spanish, and Hernandez were also present.

At this meeting, Pellegrino explained, "I have come here because I realized some people have told me [you've] been speaking with another union outside." Pellegrino told the employees that they were not supposed to speak to another union because they already had a union. Pellegrino then asked the employees, "What are you looking for in that other union?" and "What is it

[1] On August 20, 2004, Counsel for the General Counsel moved to correct the transcript in this case as to certain names, words and phrases. Neither Counsel for the Union, nor Counsel for Respondent has opposed this motion. Accordingly, I grant the motion. A copy of this motion will accompany this Decision.

that you want?" He told them, "You already have a union and the only thing that could be gained, you already have in this union . . . The union that we have can give you vacations, sick days."

Pellegrino then asked the employees if they signed cards for Local 32B-J. At that point, approximately five employees, including Gutierrez and Labrador, raised their hands and told Pellegrino they had signed cards and given Local 32B-J their names.

Gutierrez explained to Pellegrino that NOITU was not good because the employees had no benefits. Pellegrino replied that it was Local 32B-J that "wasn't any good." He informed them that the only thing Local 32B-J was good for was to take their money. Pellegrino then advised the employees that if Local 32B-J were voted in, the employees would earn the same salary that they were earning at that time and "it would be the same difference."

Gutierrez told Pellegrino she wanted more benefits, salary and respect. In response, Pellegrino told the employees, "If you want more hours, you can have more [hours], benefits and a better salary." Pellegrino informed the employees that he would give them additional hours of work at Respondent's facility located in Hauppauge, New York. He then enticed the employees by saying, "I have some buildings that I can put in. I can give you between eight and nine hours of work. You can have something a little better." Pellegrino offered employees full-time work, which was more than the part-time four-hour shifts they were then working. He told them he would pay them between $8 and $9 per hour for the additional work, which was approximately $2 to $3 more than they had been earning at that time. Gutierrez replied that if she was going to be working more hours and NOITU was going to continue to take out $15 for nothing, she would prefer to continue working the 4-hour shifts she was then working. Supervisor Hernandez then commented to Pellegrino that he thought they should give the additional hours to workers in other buildings.

Soon after Respondent learned that Labrador signed a card for Local 32B-J, on approximately June 12, 2003,[2] Respondent Operations Manager, Eddie Matos and José Herrera approached Labrador while he was working. Matos asked Labrador to provide him with his birth certificate and social security card. Labrador told them he would bring it in to them the following day.

Aside from the time Labrador was hired by Respondent in 1996, at no time did anyone from Respondent ever ask Labrador to provide them with any of those documents. Herrera confirmed on June 12, that Respondent asked Labrador for whatever papers Labrador presented when he was hired. Herrera admits that Respondent, and not the government initiated this request. Additionally, Herrera alone initiated the request for Labrador's "papers", with no input from Respondent's controller's office. It is not Respondent's practice to request a social security card or birth certificate when confirming an employee's address. In fact, Respondent only requests documentation from employees whose other papers are due to expire. However, neither social security cards nor birth certificates expire. In fact, it is conceded that none of Labrador's documents were expired, or were due to expire, at the time the request was made.

On Friday, June 12, Local 32B-J held a meeting for the workers from 265, 425, and 445, at the Taco Bell restaurant located on Route 110 in Melville, (called the Taco Bell). Present at the meeting were Local 32B-J representatives, Ericka Bozzi, and Ruben Sanchez, as well as Gutierrez, her son, Walter Gutierrez, Labrador, Balmore Guevara and around eight to ten other employees of Respondent.

The workers arrived at Taco Bell a few minutes past 10 p.m. and sat in front of the window facing the parking lot. From where they were seated, they had clear visibility outside, and nothing stood between the table where they sat, and the window to the parking lot. At the meeting, Bozzi had the employees sign authorization cards for Local 32B-J.

One employee, named José Martinez, nicknamed "El Gigante," a nonlocal 32B-J supporter did not join the others during the meeting, and, instead, went outside of the Taco Bell and spoke on the telephone. El Gigante is close friends with supervisor Herrera. Herrera often drives to and from work.

While the meeting was taking place, supervisor Herrera's van appeared outside of the window in front of the table where the workers sat. Herrera's van was parked approximate 10' from the Taco Bell window. Nothing stood between Herrera's van and the window to Taco Bell. Herrera sat in the driver's side of the van and his wife, supervisor Laticia Herrera sat in the passenger side.

Sometime after Herrera pulled up aside the Taco Bell window where the meeting was taking place, Herrera called supervisor Hernandez via his cell phone and told Hernandez, "Come and see where your people are. [They] are at this Taco Bell." Hernandez arrived shortly after and stood outside of Herrera's van beside the Taco Bell window.

The meeting lasted approximately one hour and ended at approximately 11 p.m. Taco Bell closes its doors at 11 p.m. and its drive-thru closes at 11:30 p.m. At no time did Respondent's supervisors enter Taco Bell before 11 p.m., or purchase food at the drive-thru.

After the meeting ended, the employees left Taco Bell first, followed by Bozzi and Sanchez. Herrera observed the workers exit the Taco Bell, including Gutierrez and Labrador, and he admits he knew that Labrador was driving them in his red van.

After the meeting ended, Bozzi the Union representative walked outside the Taco Bell. Bozzi saw Herrera sitting in his van, in front of the window where they had been sitting during the meeting. When they noticed Herrera sitting there, Bozzi and union representative Sanchez approached Herrera's van and Bozzi asked Herrera, "So, what did you think of the meeting?" Herrera did not deny that he observed the meeting and, instead, replied, "Oh, it was a very good meeting." Bozzi continued, "Well, if you want, we can organize these meetings for supervisors next time . . . I'll invite you to them." Herrera replied, "Yeah, okay, you know, whatever." Bozzi advised Herrera, "You know, it's illegal for you guys to be out here. These workers had every single right, outside of work to be meeting and talking about whether or not they want to organize." Bozzi accused Herrera and the others of "spying" on the

[2] All dates referred to are in 2003, unless otherwise indicated.

workers. Herrera replied that they usually go to Taco Bell to eat on Fridays. However, neither Gutierrez, Labrador, nor Guevara had ever before seen Herrera, or *any* other supervisor, at Taco Bell at any other time prior to that night. I credit these employees, as set forth below. Supervisor Hernandez then followed Bozzi and Sanchez to their car.

Hernandez then forewarned Bozzi and Sanchez that now that the workers were involved in organizing, "there [were] a lot of changes that were coming down." Hernandez explained to Bozzi that there was "a lot of pressure from the top" and "there was going to be a big crackdown on 'papeles de immigracíon'" or immigration papers. Hernandez warned Bozzi that Respondent had plans to start getting rid of undocumented workers.

On June 16, after Eddie Matos was made aware that Local 32B-J was visiting Respondent's employees and trying to organize the shop, Matos called a meeting in the basement of 445. At the meeting, Hernandez told Gutierrez to wait for the four other employees that were with her at the Local 32B-J meeting at Taco Bell on June 13 to arrive. Present at this meeting were: Eddie Matos, Herrera, Hernandez, Gutierrez, her son Walter, and three other employees from 445 who had attended the Taco Bell meeting on June 13. Matos led the meeting.

Matos began the meeting by asking the five employees, "What [were] you doing at Taco Bell?" Matos told the employees, "You already have a union" and asked them. "Who organized that meeting?" Matos then asked the employees if Pilar Gutierrez told them that Local 32B-J was going to be waiting at the Taco Bell. He then told the employees to ask Gutierrez how much she was getting paid by Local 32B-J to obtain the signed cards. Gutierrez stated she was not receiving any money from anyone. She then stated, "If we were there, it's because we all desire—we desire something better than what we currently have because the union we have [gets] $15 for nothing."

Matos then announced that with "the other union" or with any other union, the employees would get the same thing. He continued that "the other union" would take more money from the workers and they would get less. He stated: "It will be impossible because it doesn't matter what you do, you're not going to be able to get anything."

Matos then told the employees that he had a video of a man who wanted to have a new union and, "the only thing he was able to get was fired." Matos then asked the employees, "Do you think that the owner of the company is going to sign a contract only for you?" Gutierrez replied, "We all want 32B-J. He will have to sign." Matos then left the meeting visibly annoyed.

On June 16, Eddie Matos conducted a second meeting. This meeting took place at 425, at 7 p.m., in the fourth floor conference room. Present at this meeting were: Matos, Herrera, employees Guevara, and the two other employees from 425 who also had attended the Local 32B-J meeting at Taco Bell on June 13. Matos asked each of the three employees, if they had attended the meeting at the Taco Bell. Matos then asked the employees if they had known about the union meeting in advance. Guevara replied that he knew about the meeting in advance. However, the other two employees at the meeting both stated that they had not known about the meeting prior to arriving at the Taco Bell on the 13th. Matos then asked Guevara, "Why did you take those two to the meeting, if they did not know about the meeting beforehand?" At no time prior to this had Guevara ever told Matos that he took the other two employees to the meeting at Taco Bell. Matos then left the room.

Herrera then continued the meeting by stating that Local 32B-J doesn't keep its promises. He said it offers a lot of things, but doesn't do anything. Herrera told the employees he was going to show them a newspaper article stating that members of Local 32B-J are suing the union because it has not kept its promises. However, Herrera never showed the employees the article he described.

June 25, 2003 Discharge of Walter Gutierrez

Pilar Gutierrez' son Walter, worked for Respondent during the first weeks of April 2003. Gutierrez was present when Hernandez hired her son, Walter. At the time he was hired, Walter openly informed Hernandez that "his papers were not good for work." Hernandez told Walter that Herrera said that that would not be a problem. Hernandez reassured Walter that Herrera was going to pay him under the name of another employee who had left Respondent's employ, whose name was Virginia Bonilla. He also told him the arrangement was made with Virginia Bonilla's permission. It was Herrera's idea to have Walter employed at Respondent under a false name. Although Herrera admits he knew it was wrong, he nonetheless gave the okay for Walter to work for Respondent under a false name. Herrera gave this okay, despite the fact that Herrera knew that Walter never presented valid working papers before he was hired. Respondent has orchestrated this type of arrangement on numerous prior occasions, to help other El Salvadorians get work.

Walter was paid under the name Virginia Bonilla for approximately 4 weeks. With Herrera's knowledge, Walter was also paid under the name Teofila Herrera at some point during his employment at Respondent. Teofila Herrera is José Herrera's mother. Each week, Hernandez handed Walter a check containing the name of Bonilla, or Teofila. Hernandez provided Gutierrez with detailed instructions regarding how these false checks should be cashed so that Walter would get his weekly pay.

On June 24 when Gutierrez and Walter arrived at work at 6 p.m., Hernandez told Walter that he could no longer be paid under the name Virginia Bonilla because the real Virginia Bonilla did not want him to continue using her papers. Hernandez told Walter that he should bring in "other papers" to see if he could continue working at Respondent.

The next day, when Gutierrez and Walter arrived at work, Walter handed Hernandez a birth certificate and social security card. Hernandez called Herrera and afterwards told Hernandez that those papers were being rejected because no photo identification accompanied them. Two days later, Walter brought in new papers. Herrera rejected these papers as well. Hernandez told Walter that the papers he brought were "not any good" and it was his last day of work. Hernandez told Walter that his earnings for his last day of work would appear on Gutierrez' paycheck. That was Walter's last day of work for Respondent.

June 28, 2003 Letter to Respondent's President Paul Kaplan

On June 28, 4 days after Walter was discharged, six employees, including: Gutierrez, Labrador, Guevara, a/k/a Irma Guevara, and Walter, a/k/a Virginia Bonilla, got together, wrote and signed a letter addressed to Respondent's president, Paul Kaplan. The letter notified Kaplan that its supervisors, Herrera and Matos, were engaging in illegal activities, harassing them because of their support for Local 32B-J. After listing all the illegal actions taken by Kaplan's supervisors, the letter went on to request the Virginia Bonilla, a/k/a Walter Gutierrez, be reinstated to his prior position with Respondent. A few days later, Bozzi both faxed the letter to Respondent's office and mailed it to Paul Kaplan.

Local 32B-J's Press Conference/Rally on July 1, 2003

On July 1, Local 32B-J held a press conference/rally across the street from 445, at 12 noon. Present at the rally were: Bozzi, Sanchez, Gutierrez, Labrador, Guevara, members of the press, elected officials, church leaders and union members. In all, approximately 70 people attended the rally. Nothing blocked the view of 445 from where the employees stood during the rally and anyone inside of 445 could see them. To amplify the speakers' voices at the rally, Local 32B-J used a blow horn with a microphone attached to it. When someone spoke, they could be heard.

At the rally, Gutierrez and Guevara held up an enlarged copy of a letter signed by employees who attended a Local 32B-J meeting at a church on June 29. Respondent's supervisors were aware of the rally, and heard the speakers.

Gutierrez signed the letter for herself and, at her son Walter's request, signed the name "Virginia Bonilla" on it for her son. She signed that name for him because Walter Gutierrez was paid under the name "Virginia Bonilla" during the time that he worked for Respondent and he was ashamed to sign a woman's name on the letter. Local 32B-J blew up the letter, added the English translation to the left of the Spanish, and scanned the signatures onto it.

In addition to holding up the aforementioned letter to the crowd, Gutierrez and Guevara also spoke at the rally. Gutierrez stood in front of the crowd on a hill, and using a bullhorn/microphone, she read the sign she was holding out loud, which complained that Respondent pays wages as low as $6 per hour and that workers have to wait seven years to get a $1 raise. Guevara stood next to Gutierrez on the hill and also read part of the sign to the crowd. They were around 15 yards from 445 when they spoke.

Labrador played a part in the July 1 rally as well. He held up a 3' by 2' sign that said, "Local 32B-J" in the walkway of 445, while the rally was taking place.

July 1, 2003 Discharge of Pilar Gutierrez

Later on, on the same evening that Gutierrez spoke to the crowd at the Local 32B-J press conference/rally, Gutierrez was called into a meeting with Matos, Herrera, and Hernandez. No one from NOITU, Gutierrez' union, was present at this meeting. At the meeting, Matos informed Gutierrez, "I called you in here to tell you that you cannot continue working here because I have in my hands evidence." Matos referred to the checks with which Walter was paid when he worked for Respondent. Respondent's controller, Mindy Levy, admits that had the employees not sent the June 28 letter to Paul Kaplan, Respondent never would have investigated Gutierrez having deposited these checks into her account. This deposit was part of Respondent's complex plan to enable Walter to be paid by using the names of employees no longer employed by Respondent. Matos told Gutierrez that she could not continue working for Respondent because he had proof that she had deposited those checks into her own account. Matos admittedly discharged Gutierrez without ever asking her supervisor, Hernandez, who had instructed Gutierrez to deposit the checks into her own account and who was sitting right there, if he knew anything about the situation.

Gutierrez responded that that was not "proof" against either her or her son. She told Matos he was the guilty one because he loaned the papers to her son allowing him to work. Matos simply replied that she could not continue working for Respondent. Gutierrez told Matos that he had to send her a letter outlining what she had done wrong. She added that she knew that the real reason she was being fired was because she was supporting Local 32B-J. In response to Gutierrez' comment that the real reason she was being discharge was because she supported Local 32B-J, Matos stated, "If this problem had been resolved in our own country, it would have been resolved in a different way." "In El Salvador, a person who joins a union sometimes dies." Gutierrez told Matos that he treats her as if they were in El Salvador. Matos then said, in an angry tone of voice, "I don't want to see you again in any of these buildings."

After Matos discharged Gutierrez, Pellegrino finally investigated the discharge and found out that Hernandez knew all about Gutierrez' depositing Virginia Bonilla's checks into her account for Walter and allowed it. However, despite learning that Hernandez had engaged in illegal conduct, Pellegrino neither discharged nor suspended Hernandez.

On July 2, the day after Gutierrez was discharged, Matos called Gutierrez' home and told Labrador that Gutierrez should return to work that night. Therefore, Gutierrez went back to 445 at 6 p.m. that night to work her regular shift. When Gutierrez arrived, Pellegrino, Herrera, Matos, and Hernandez all were curiously there to greet her. Pellegrino handed Gutierrez a letter and told her that she could return to work. The letter simply stated, "Based on further investigation, the Company is rescinding your discharge and offering you immediate reinstatement." Pellegrino told Gutierrez that "the problem with the check had been investigated" and "there was nothing against her." He told her that he wanted her to continue working for Respondent because she was "a very good worker." Gutierrez nodded and said, "Thank you." Matos then told Gutierrez that he was very sorry but he did not realize he was required to give her "notices, any warnings," before he could fire her.

Discipline Imposed on Balmore Guevara and His Discharge on July 3

In October 2002, Hernandez hired Guevara to work as a night shift cleaner in 445. When Hernandez hired Guevara, he never asked Guevara to fill out any employment application, or

to present Hernandez with any work authorization documents, or any documents whatsoever. When Guevara arrived at work on his first day, Hernandez said to him, "You are going to work under the name of Irma Guevara." Irma Guevara is Guevara's female cousin, who had worked for Respondent during 2002, but who was no longer working for Respondent at the time Guevara was hired. Hernandez also supervised Irma Guevara.

When he was hired, Hernandez informed Guevara that Herrera, the boss, was in agreement with this arrangement concerning Guevara's working under his cousin's name. When Herrera was made aware of the arrangement, he informed Matos about it. Business as usual.

Hernandez personally handed Guevara a check every Thursday. During the entire time that Guevara worked for Respondent, from October 2002, until the date of his discharge, Irma Guevara's name appeared on the checks that Hernandez handed Guevara. Guevara was unable to legally cash any of those checks. During that period, his cousin Irma Guevara would cash the checks Guevara was issued and then give Guevara the money.

On or about June 17, Guevara, Gutierrez, Labrador, and Walter knocked on the doors of around 15 coworkers. One of the doors that Guevara knocked on was the door of Rosa Elvira, someone who worked at 425 who is a good friend of Hernandez'. When Elvira opened her door, she asked Guevara, "What are you doing here?" Guevara replied, "We are visiting homes to speak to people about Local 32B-J." Elvira told Guevara that she did not want to know anything and instructed him to leave.

On June 24, at around 8 p.m., Herrera's 11 year-old son approached Guevara while he was working, handed him a warning letter and said, "Read it and sign it." The warning was addressed to "Irma Guevara." The warning said Guevara was not getting his job done well. Prior to that night, Guevara had never been warned, either verbally or in writing, that his work was deficient in any way. Guevara told his supervisor, Laticia Herrera, that he would not sign the warning because he was doing his work completely. A few minutes later, José Herrera and Matos approached Guevara and Herrera asked Guevara, "Why don't you sign the warning?" Guevara replied, "No. I am not going to sign it."

After Guevara refused to sign the written warning, José Herrera responded, out of the blue, "You have three days to present new work papers." Herrera had never before mentioned anything to Guevara concerning presenting work papers to him.

On or about June 28, 2003, the same day the employees' letter to Kaplan was faxed to Respondent, Guevara's supervisor, Laticia Herrera, asked Guevara if he had brought in the new work authorization papers. Guevara said he had them and Laticia then called José Herrera to the building. Herrera was satisfied with the new papers and accepted them. Herrera then handed Guevara an employment application. Guevara had never before seen such application and, because it was written in English, Guevara asked Herrera to complete it for him. Herrera agreed to do so. At that time, Herrera claims that he found out that the man who he and everyone else had always referred to as "Morey" or "Balmore", was really Rafael Argueta. However, despite his alleged uncertainty, Herrera still assisted Guevara by filling out the application for him and handing it in to Respondent's office for him.

On July 1, Guevara spoke at the press conference/rally outside of 445, discussed above. Two days later, on July 3, Laticia met Guevara at the entrance to 425 at 6 p.m. and told him, "You cannot work here anymore because your papers have been rejected by the company." Guevara asked her "Why?" Laticia responded only, "The papers were not accepted by the company, so you no longer have any work." Guevara asked her, "Why [is] it that a lot of people were working with that type of papers [and they] were not fired? Why is it only myself that [is] being fired?"

Guevara asked to speak to José Herrera. Herrera came to him and Guevara asked Herrera, "What's the problem?" Herrera replied, "Your papers have not been accepted within the company." These were the same papers that were accepted by Herrera a few days before that, before Guevara spoke on behalf of Local 32B-J at the rally. Herrera explained to Guevara, "The company has become very strict. After you signed a letter, you—after you signed a letter and you gave it for presentation to the company boss." Herrera explained to Guevara, "If you had not signed this letter, the boss would not have become annoyed." The letter Herrera spoke of was the June 28, 2003 letter that Guevara and the other Local 32B-J employee supporters sent to Paul Kaplan. Herrera further explained, "If you had not signed the letter, the things would not have gotten so strict. From here on, everyone who works with these types of papers will—will be fired also." Guevara then asked for a dismissal letter that would explain why he was being dismissed. Herrera told him he would not receive such a letter. At no time since the day of his discharge has Respondent offered Guevara reinstatement.

José Herrera testified that over the last 3 years, numerous employees have been discharged for not possessing valid work authorization papers. If these discharges took place, he said there would be documentation establishing them. However, Respondent provided no documents in response to General Counsel's demand for information about all employees who were discharged for not having appropriate working papers and Respondent's controller, Mindy Levy, knows of no other employees who were discharged for not having valid paperwork.

Discipline Imposed on José Labrador
June 23, Written Warning to José Labrador

On June 23, Labrador arrived at work at 6:08 p.m., eight minutes later that his scheduled starting time of 6 p.m. When he arrived at work that night, Labrador, and the seven other employees whom Labrador drives to work each night, all signed in. Labrador observed the others sign in at the same time as Labrador did. After they all signed in, Matos handed Labrador a written warning for lateness. Matos did not give any lateness warning to any of the other employees who arrived to work late with Labrador that evening.

When Matos handed Labrador the warning, Labrador asked him, "Why are you giving me this warning?" Matos did not respond.

Since he began working for Respondent in 1996, Labrador has always driven eight of his coworkers to work each night in his van. He drops off employees at 265, 425, and 445. Thus, since Labrador began working for Respondent, he admittedly has arrived late to work on many occasions. However, even on days on which Labrador arrived late for work, he always signed in with the correct time. Despite these countless known prior latenesses throughout the years, Respondent never sought fit to issue any warnings, either verbal or written, to Labrador for his latenesses, or for any other reason, until after he began supporting Local 32B-J. His first warning was issued on June 23, 2003. Coworker José Martinez, who is friendly with Herrera and who rode to work with Labrador every day in 2003, concedes he never received any warning for being late.

Respondent's practice is to always give a verbal warning for lateness, prior to issuing a written warning. Herrera concedes that sometimes an employee is given as many as three verbal warnings prior to receiving a written warning. If there is no improvement after the verbal warnings, Respondent will then issue a written warning to the tardy employee. Matos admits he never spoke to Labrador about his latenesses before June 23, 2003.

June 24, Written Warning to José Labrador

The day after Respondent issued Labrador his first warning since he began working for Respondent in 1996, Respondent on June 24, issued Labrador a *second* written warning and a suspension. That night, when Labrador arrived at work at 6 p.m., he proceeded to the basement closet to retrieve his floor buffing machine, as he did every night. Labrador credibly testified he always allows the ladies to get their supplies before he does. The other employees have no problem retrieving their supplies from the closet before Labrador removes his machine.

On that evening, seven other employees were waiting on line for their supplies in front of Labrador. While they waited on line, Labrador conversed with the other employees for around 5 minutes. No one mentioned Local 32B-J to Labrador during this conversation. Labrador never discussed Local 32B-J during working hours. Labrador had had many similar conversations to that which he had that day while waiting on line for the supply closet. His manager was aware of these numerous prior conversations since he stood there while the conversations were occurring. Despite these countless conversations, Labrador had never before received a warning for talking on line while waiting for supplies until June 24, 2003.

José Herrera admits Respondent has no restriction against talking while waiting on line to get supplies. Further, Respondent has no policy prohibiting employees from talking to each other when they are not working. Moreover, Respondent has no policy prohibiting talking while working. Employees are permitted to talk while they mop and clean as long as it does not affect their jobs. Nevertheless, as Labrador and the other employees were conversing that night, Matos gave Labrador a warning for talking to his coworkers.

When Matos handed Labrador the warning, Labrador said to Matos, "I arrived early. Why are you giving me a warning? You are giving me a warning—only to me." Matos did not respond to Labrador. Labrador then went to work on the first floor.

Soon after, Herrera approached Labrador while he was working. Herrera told Labrador that he had three warnings and, because of that, Labrador had to leave the premises. Labrador asked, "Why? *Three* warnings?" Herrera explained to Labrador that he had given him warnings "way before," when Labrador worked in 445. Labrador did not know to what Herrera was referring and Herrera did not explain to what warnings he was referring. In fact, there is no evidence that Labrador had ever received any warnings in 445 for any reason. Herrera told Labrador that he was suspended for 3 days, from June 24 through June 27. Respondent did not suspend, or discipline in any way, any of the other three or four employees involved in the incident. Labrador served the suspension and was not paid for any part of the 3 days that he was out. Respondent concedes that an employee waiting online, talking to other employees would not deserve to be suspended.

Herrera wrote a report about the incident that he alleges was the impetus of Labrador's suspension. Herrera never spoke directly with any of the employees involved in the incident before handing in the report and issuing the discipline. The incident report states workers were "getting ready to do their jobs," when Labrador "started talking," not yelling, "about the opposing Union 32B-J, trying to convince the workers to join 32B-J." The report then states that employees Joel Ramirez and Oscar Cruz got angry and responded negatively. The report says nothing about Labrador getting angry or raising his voice at any time. Ramirez and Cruz did not testify.

Respondent is required to give three warnings to an employee before it can suspend or terminate the employee. The warnings must be written. If it's a big infraction, Respondent does not need to issue a warning prior to discharging an individual. It depends on the level of the infraction.

Labrador's personnel file contained a letter to Labrador from Respondent's Controller, Mindy Levy, dated August 1, 2003, stating that Respondent received complaints about Labrador's work performance from the tenant in the building and warning that if he did not improve over the following 5 days, Respondent would take further action. The letter noted that Labrador had three previous warnings, but only mentioned two such warnings. Labrador testified he had never seen the letter until the date of this trial. He does not know to what the letter is referring. The letter is addressed to 5 Spring Street, however, Labrador lived at 71 Jefferson Avenue on August 1, 2003.

In 2003, employees other than Labrador cleaned the floors of 265 on several occasions. Between June 14, 2003 and August 1, 2003, floaters cleaned the floors of 265 more than 20 times.

Respondent's Controller, Mindy Levy, clarified that when there is a problem with an employee's performance, the employee's supervisors always speak to the employee first and discuss the problem with him or her prior to issuing the employee a written warning. At no time since Labrador began working for Respondent in 1996, did any one from Respondent ever mention anything to Labrador regarding complaints about his work performance. In fact, Labrador's immediate supervisor at the time the letter was written, Rene Iraheta, describes Labrador as having done "good work." Levy states that if Lab-

rador had been verbally warned about his performance before this warning was issued, a notation would most likely be in his personnel file. No such notation appeared in Labrador's file. Additionally, if Levy had been made aware of prior verbal warnings with Labrador on this subject, she would have mentioned them in her August 1, 2003 written warning letter. She made no mention of any such prior verbal warnings on the subject in her August 1 letter.

In September 2003, Respondent began stapling newsletters entitled, "Plain Talk" on to all its employees' paychecks, including those issues of "Plain Talk" dated July 1, and September 23.

The first paragraph of the July 1, issue of "Plain Talk" states, "Local 32B-J had a meeting on Sunday, June 29th in a house of worship. They desecrated it by using it to spread lies about their rate of pay."

Item 2 of that same newsletter, under the section asking, "WHAT WILL IT DO FOR YOU?" asks, "WILL IT GIVE YOU A RAISE?" The newsletter answers, in the column entitled, "WHAT WILL IT DO FOR LOCAL 32B-J?", "NO. In fact, it could possibly cost us your jobs." The Spanish version of the newsletter answered the question slightly differently. It states, "The reality is that it will most likely cost us your jobs."

The September 22, issue of "Plain Talk" states that Local 32B-J told the Board that many of Respondent's employees were undocumented and it is creating problems for hardworking Hispanic people. The issue goes on to say that Local 32B-J is trying to get the INS to threaten Respondent's employees and calls Local 32B-J "unscrupulous."

Credibility Resolutions

I was very favorably impressed with the demeanor of General Counsel's witnesses, Bozzi, Sanchez, Gutierrez, Labrador, and Guevara. Each witness testified in great detail on direct testimony and were responsive under Respondent's vigorous cross examination. Their testimony on cross examination was consistent with their direct testimony. The testimony of the employee witnesses had in my opinion, a "ring of truth."

Respondent's witnesses, on the other hand were entirely incredible, untruthful and their direct testimony often totally inconsistent with their cross examination. Much of their testimony was so unbelievable, that at times I thought they were perhaps pulling my leg. Respondent's witnesses were simply untruthful, and I discredit their testimony entirely, except where they make admissions against Respondent's interest. Respondent's witnesses simply had the "ring of untruthfulness."

Respondent's key witnesses, including José Herrera, Eddie Matos, Mindy Levy and Tom Pellegrino, offered testimony that was from beginning to end, riddled with inconsistencies and shockingly contradictory. The demeanor of many of these witnesses, especially Herrera and Matos, was belligerent and uncooperative. While testifying at great length during direct examination, Respondent's witnesses grew suspiciously evasive and confrontational during cross examination, claiming not to understand straightforward, simple questions. They inartfully attempted to avoid directly answering questions and generally answered unresponsively.

Each of Respondent's witnesses' testimony was replete with inconsistencies and internal contradictions. The myriad contradictions, inconsistencies and incredible exaggerations by Respondent's key witnesses are too many to recite all of them herein. However, a few examples are as follows: Herrera first admitted that Respondent requested from Labrador whatever papers he presented when he was hired and he did not know why. However, later, on redirect, Herrera concocted the story that Respondent was simply requesting Labrador's new address. Herrera also stated that anybody Respondent hires had to supply it with working papers or they would not be hired. However, he later conceded that he knew Balmore Guevara was hired without handing in any papers and he did not report it when he found out.

In addition, Respondent's witnesses' testimony contradicted that of Respondent's other witnesses. In this regard, Matos denied ever asking Labrador for his paperwork. However, as noted above, Herrera admitted that they asked Labrador for his paperwork. Herrera said they asked for Labrador's paperwork because he received a note from Respondent's Controller, Mindy Levy, to do so. However, Levy denies sending such a note. Herrera stated that the purpose of the meeting on May 8, 2003, was to address employee lateness. However, Pellegrino stated the purpose of the meeting was to address complaints about cleaners from the landlord, not lateness. Thus, Respondent's own witnesses exposed its entire defense to be both a pretext and a sham.

Perhaps the most glaring example of the weakness of Respondent's case was Respondent's failure to provide witnesses, such as supervisors Ronnie Hernandez and Laticia Herrera, and documents, such as memos and sign-in sheets, to support its contentions. Instead, Respondent merely flooded the record with unsubstantiated innuendo and sweeping, vague accusations, hoping they would pass for credible, probative evidence. Some of Respondent's witnesses, such as Herrera and Matos, exhibited a clear willingness to say anything at all—no matter how preposterous, illogical, exaggerated or just plain false—to square with its concocted defense and to cover up its unlawful conduct.

It is noteworthy that Respondent failed to produce Ronnie Hernandez to corroborate Herrera's testimony, to explain his practice of hiring undocumented workers, to explain why he showed up at the Taco Bell, and what he told Bozzi that night and to shed light on prior warnings alleged to have been issued to Labrador. Respondent also failed to produce Laticia Herrera to substantiate José Herrera's testimony about what occurred at the Taco Bell and why she issued Guevara, who she immediately supervised, a written warning and later dismissed him. Respondent further failed to present any employee witnesses to support its account of the incident that took place outside the supply closet, giving rise to Labrador's 3-day suspension. Since Respondent failed to present either of these witnesses that could have corroborated its witnesses, the inference must be drawn that any testimony given by Hernandez or Laticia Herrera would not have supported Respondent's accounts. *Hudson Moving & Storage Co.*, 322 NLRB 1028 (1997).

Finally, Respondent failed to produce any memoranda concerning why it requested documentation from Labrador and

Guevara when it did, or sign-in sheets proving Labrador signed-in later than all the others not issued warnings. Respondent's failure to produce material, relevant evidence with a satisfactory explanation leaves me with no option but to draw the inference that such evidence would not have supported Respondent's accounts. *Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977).

CONCLUSIONS OF LAW

Respondent Violated Section 8(a)(1) of the Act by Interrogating Gutierrez and Directing Her Not to Speak to Union Representatives During the First Week of May 2003.

The evidence established that Herrera's statement to Gutierrez asking her to verify that she gave her name, address and telephone number to Local 32B-J and his direction to her that she not speak with Local 32B-J representatives outside of work because they were from "another union" both violated Section 8(a)(1) of the Act.

The Board has held that the questioning of an employee about his or her union activities by a high-level company official, without a legitimate purpose and without assurances against reprisals, is inherently coercive in nature. *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996). In the instant case, the questioning was done by Herrera, a high level supervisor, without a legitimate purpose and without any assurances against reprisals. Additionally, applying the totality of the circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. *sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), it can be said that the questioning at issue, occurring immediately after she spoke with the Local 32B-J representatives outside the building, would reasonably tend to coerce Gutierrez, so that she would feel restrained from exercising her Section 7 rights to speak to union representatives outside of work. *Westwood Care Center*, 330 NLRB 935 (2000), and cases cited. Under these circumstances, I find the evidence established that Herrera unlawfully interrogated Gutierrez in violation of Section 8(a)(1) of the Act.

The Board has held that an employer's directive to employees prohibiting them from speaking to union representatives is unlawful conduct. *Albertson's, Inc.* 319 NLRB 93 (1995). Under this reasoning, I find Herrera's directive to Gutierrez that she not speak to those people from the other Union was also a violation of Section 8(a)(1) of the Act.

Pellegrino's Interrogation, Threat of Futility, Threat of Loss of Pay and Promise of Benefits on May 8, Violated Section 8(a)(1) of the Act

I find the creditable testimony established that Pellegrino's question to employees, "What are you looking for in that other Union?" and "What is it that you want?" along with his inquiry as to who had signed authorization cards for Local 32B-J were all unlawful interrogations in violation of Section 8(a)(1) of the Act. Again, this questioning was done by a high level supervisor, Respondent's vice president, without a legitimate purpose and without assurances against reprisals. The answer to the question posed by Pellegrino concerning who signed cards would clearly indicate whether the employees did or did not support Local 32B-J. *Dealers Mfg. Co., supra.*

Additionally, applying the totality of the circumstances test adopted by the Board in *Rossmore House*, supra, it can further be said that the questioning at issue, taking place in a formal meeting with a high level supervisor, at the commencement of an organizing campaign, would reasonably tend to coerce the employees so that they would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Care Center, supra.* I find this questioning by Pellegrino was an unlawful interrogation in violation of Section 8(a)(1) of the Act.

I find Pellegrino's statement to the employees that if Local 32B-J was voted in, the employees would earn the same salary and "it would be the same difference" was an unlawful threat of futility because it notifies employees that Respondent would not negotiate with Local 32B-J to get the employees better wages and benefits if Local 32B-J did get in. Taken in the context of the other unfair labor practices committed by Respondent, this statement could convey no message other than that voting in Local 32B-J would be futile. See, *Naum Bros., Inc.*, 240 NLRB 311 (1979) (Where the employer made no attempt to factually support its statements that "no retail operation could operate or pay the wages that that Union would want them to pay," the Board found an unlawful threat of futility.) As such I find this statement violated Section 8(a)(1) of the Act.

The credible testimony establishes that Pellegrino asked the employees, "What is it that you want?" and told them, "If you want more hours, you can have more [hours], benefits and a better salary." Pellegrino then offered the employees full-time hours at Respondent's Hauppauge facility. This question and answer solicited grievances and sought to remedy them by offering employees, including Gutierrez, whom he had previously learned was a Local 32B-J supporter, more hours of work. The evidence disclosed that this offer of additional working hours, which would make employees eligible for benefits, came less than 1 month after Local 32B-J began organizing at Respondent. The suspicious timing of this offer indicates an unlawful motivation behind it. Accordingly, I find both Pellegrino's solicitation of grievances here and the promise of benefits violated Section 8(a)(1) of the Act.

Herrera and Matos' Demand That Labrador Provide Them With His Birth Certificate and Social Security Card for No Apparent Reason Other Than to Harass Him Violated Section 8(a)(1) of the Act

The evidence clearly established that Matos and Herrera's demand for a birth certificate and social security card from Local 32B-J supporter Labrador on approximately June 12, violated Section 8(a)(1) of the Act. First, this demand came a mere four days after Labrador announced to Pellegrino and Herrera that he had signed an authorization card for Local 32B-J. Secondly, although Herrera concedes the request was made, Respondent was utterly incapable of providing an adequate explanation as to why this extremely odd request was made at the time it was. Herrera concedes that Respondent's practice is to only request documentation from employees whose papers are due to expire. And yet he also admits that none of Labrador's documents were expired on June 12. Moreover, Herrera concedes social security card and birth certificates *never* expire

and he could provide no logical reason why Levy wanted them checked at that point in time. Herrera's belated attempted explanation that Respondent was asking for the documents to somehow verify Labrador's new address fails miserably. Clearly, the Administrative Law Judge pointed out, Respondent could have simply asked Labrador for his new address. And equally as plain, if Respondent truly was interested in change of address information from Labrador, it would not have asked him to supply his social security card and birth certificate, both of which obviously do not contain Labrador's new address. Therefore, I find the only logical reason for this odd request, at this suspicious time, was to harass Labrador because of his support for Local 32B-J. Accordingly, I find Respondent's request to Labrador violated Section 8(a)(1) of the Act.

José and Laticia Herrera's Surveillance of the Local 32B-J Meeting at Taco Bell on June 13, Violated Section 8(a)(1) of the Act.

The credible testimony establishes that Respondent, by José and Laticia Herrera, engaged in unlawful surveillance of Local 32B-J's meeting at Taco Bell on June 13, 2003. In *Huck Store Fixture Co.*, 334 NLRB 119, 128 (2001), the Board adopted the Administrative Law Judge's finding that the employer engaged in unlawful surveillance of its employees at a union meeting because "employees would be reluctant to attend such a meeting knowing that they would be seen by management." In support of it's finding, the Board relied on the fact that at least one employee attending the meeting saw the supervisor there and the supervisor observed two employees arriving at the meeting. Id., supra at 119, fn. 2. In the instant case, Guevara testified that he observed Herrera's van outside the window in front of the table where the employees sat while the meeting was taking place. They had clear visibility of the employees attending this meeting. Additionally, Gutierrez, Labrador, and Bozzi all testified that the Herrera supervisors and Hernandez were parked directly outside of the Taco Bell window as they were leaving the Taco Bell.

Herrera's incredible testimony is that he was looking for a parking space is senseless. He admits that the restaurant portion of the Taco Bell was closed when he arrived and they "couldn't get tacos inside", so there would be no reason for Herrera to be searching for a parking space. And, in fact, Herrera also described the parking lot as "small", not crowded, and with only a few cars. Thus, his claim that he was searching for a parking space at the time is clearly false.

Perhaps the most convincing evidence that the surveillance took place is Respondent's failure to call Ronnie Hernandez to the stand to dispute Bozzi's testimony that Herrera called Hernandez and told him, "Come see where your people are. [They] are at this Taco Bell." Based on Respondent's failure to present Hernandez to discount Bozzi's account and support Herrera's account, the inference must be drawn that any testimony given by Hernandez would not have supported Respondent's accounts. *Hudson Moving & Storage Co., Inc.,* supra. Thus, I find the totality of the circumstances suggests that the Herreras' engaged in unlawful surveillance of the Local 32B-J meeting that took place on June 13, in violation of Section 8(a)(1) of the Act.

Eddie Matos' Interrogation, Conveying the Impression of Surveillance, Statement of Futility and Implied Threat of Discharge at the June 16, Meeting at 445 Violated Section 8(a)(1) of the Act

The credible testimony established that Matos' singling out and questioning of the 445 employees who attended the June 13 Local 32B-J meeting violated Section 8(a)(1) of the Act. Matos unlawfully asked these employees the following (1) "What were you doing at Taco Bell?,", (2) "Who organized the meeting?", and (3) If Gutierrez told them that Local 32B-J was going to be waiting at the Taco Bell. As noted above, this questioning was done by a high-level company official, without a legitimate purpose and without assurances against reprisals. *Dealers Mfg. Co.*, supra at 948. I find this questioning was inherently coercive in nature and applying the totality of the circumstances test adopted by the Board in *Rossmore House, supra*, the questioning at issue, taking place in a formal meeting with a high level supervisor, would reasonably tend to coerce the employees so that they would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Care Center,* supra. Accordingly, I find this questioning by Matos to the 445 employees who attended the Taco Bell meeting was an unlawful interrogation in violation of Section 8(a)(1) of the Act.

The evidence also establishes that at the same meeting for the 445 employees who attended the Local 32B-J meeting at the Taco Bell, Matos' unlawfully gave employees the impression that their activities on behalf of Local 32B-J were under surveillance. The Board's test for determining whether an employer has created the impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999), citing *United Charter Service,* 306 NLRB 150 (1992). In this regard, "[T]he Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance . . . Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means." *Hal (Id)* at 51, quoting *United Charter Service, supra* at 151. The rationale behind "finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Hal (Id)* at *supra* at 51, quoting *Flexsteel Industries,* 311 NLRB 257 (1993).

The Board has held that statements to employees that suggest that the employer is closely monitoring the employees' union involvement, unlawfully creates the impression that their union activities are under surveillance in violation of Section 8(a)(1) of the Act. *Palagonia Bakery Co.*, 339 NLRB 515, 526 (2003); *Acme Bus Co.*, 320 NLRB 458, 477 (1995); *Flexsteel Industries,* supra; *Emerson Electric Co.*, 287 NLRB 1065 (1988). In the instant case, the evidence established that Matos called only those employees who were present at the June 13 Local 32B-J meeting at Taco Bell to the meeting at issue. He then made the

employees aware that he knew that Local 32B-J had had a meeting, where that meeting took place and that each one of the employees present had attended the meeting. In these circumstances, Matos's statements indicated to the employees that Respondent was closely monitoring the employees' involvement with Local 32B-J. Further Matos' comments, displaying his knowledge and details of the Local 32B-J meeting could be said to have reasonably led employees to assume that their activities on behalf of Local 32B-J were under surveillance. Therefore I find Respondent violated Section 8(a)(1) of the Act.

The credible evidence further established that Matos unlawfully made statements during this meeting advising the employees that it would be futile to select Local 32B-J as their collective bargaining representative. In this regard, Matos asked the employees: "Do you think that the owner of the company is going to sign a contract only for you?" Matos also told the employees that with "the other union" or with any other union, the employees would "get the same" and Respondent's singing a contract with Local 32B-J "will be impossible because it doesn't matter what you do, you're not going to be able to get anything."

The Board has held that the true message and effect of an employer's prediction of futile bargaining must be viewed against the background of the employer's total course of conduct. *Naum Bros., Inc.*, supra. In *Naum Bros.*, the employer threatened the futility of unionization against a background containing a discriminatory discharge, the unlawful promise and grant of increased benefits, interrogation, and creating the impression of surveillance. The Board concluded, "In such context, it would have been virtually impossible for employees to avoid the conclusion that they were being threatened with dire consequences if they voted the union in." Supra. Similarly, in the instant case, where Respondent's course of conduct also includes discriminatory discharges and warnings, threats, solicitation of grievances and promises to remedy, interrogations, surveillance and conveying the impression of surveillance, Matos' statement could convey no other message other than that voting in Local 32B-J would be futile. Accordingly, I find these statements violated Section 8(a)(1) of the Act.

The credible testimony additionally establishes that Matos' statements also contained an unlawful implied threat of discharge. In this regard, Matos told the 445 employees that he possessed a video of a man who wanted a new union in and the only thing he was able to get was fired." The Board has long evaluated messages from employers, not in isolation from each other, but in their "total context." *Madison Kipp Co.*, 240 NLRB 879 (1979): *Arch Beverage Corp.*, 140 NLRB 1385 (1963). Employers' statements pertaining to loss of jobs that might result from unionization are evaluated within the "total context" in which they appear, under the standards established by the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

I conclude Matos' comments in terms of their total context were unlawful. The comment was made amidst a barrage of unlawful 8(a)(1) statements, including an interrogation, conveyance of an impression of surveillance and statement of futility. I find the statement is clearly coercive, conveying to the employees that if they attempted to get a new union in, they too would be discharged. Accordingly, I find such statement to be a violation of Section 8(a)(1) of the Act.

Eddie Matos' Interrogation and Conveying the Impression of Surveillance at the June 16, Meeting at 425 Violated Section 8(a)(1) of the Act

The credible testimony established that at a meeting held solely for 425 employees who attended the June 13 Local 32B-J meeting at the Taco Bell, Matos unlawfully interrogated the employees about the Taco Bell meeting. In this regard, Matos asked the employees if they attended the meeting at the Taco Bell and if they had known about the meeting in advance. Matos also questioned Guevara about why he drove the other two employees to the meeting if they did not know about the meeting beforehand.

As set forth above, the questioning was done by Respondent's Operations Manager, a high-level company official, without a legitimate purpose and without assurances against reprisals. *Dealers Mfg. Co.*, supra at 948. Thus, this questioning was inherently coercive in nature and applying the totality of the circumstances test adopted by the Board in *Rossmore Hours*, *supra*, the questioning, taking place in a formal meeting with a high level supervisor, on the heels of a union meeting to which the employees being questioned attended, would reasonable tend to coerce the employees so that they would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Care Center*, supra. Accordingly, I find this questioning was an unlawful interrogation in violation of Section 8(a)(1) of the Act.

As noted above, the credible evidence disclosed that Matos called only those 425 employees who were present at the June 13 union meeting at Taco Bell to the meeting at issue. He then informed the employees that he was aware that there was a union meeting, he knew where it was held and he knew that Guevara had driven them all to the meeting. In these circumstances, Matos' comments, displaying this kind of knowledge about and details of the Local 32B-J meeting and Guevara's participation in it, can be said to have reasonably led employees to assume that their activities on behalf of Local 32B-J were under surveillance. *The Hertz Corp.*, supra at 1025; *Bay Corrugated Container Co.*, *supra* at 455–456. Accordingly, I find Matos' statements here are violative of Section 8(a)(1) of the Act.

Respondent Unlawfully Created the Impression of Surveillance and Threatened Job Loss in the July 1, Issue of "Plain Talk" and Displayed Animosity Towards Local 32B-J in the September 23, Issue of "Plain Talk"

I find Respondent also unlawfully created the impression of surveillance by the language Respondent used in the first paragraph of its July 1, issue of "Plain Talk," advising employees that it knew that "Local 32B-J had a meeting on Sunday, June 29th in a house of worship."

Applying the Board's test for determining whether an employer has created the impression of surveillance, it can easily be said that the employees would reasonably assume from this statement that their activities on behalf of Local 32B-J had been placed under surveillance. *United Charter Service*, supra at 150. How else would Respondent have known that there was a

Local 32B-J meeting on that date and how else would it have known the location of that meeting? Additionally, in light of Respondent's surveillance of the employees' activities on behalf of Local 32B-J at the Taco Bell on a prior occasion, and its questioning of employees about their attendance at the Taco Bell meeting thereafter, I find the employees already felt that Respondent was closely monitoring their Union involvement. This statement in the July 1 "Plain Talk" could only serve to amplify that feeling. In these circumstances I find Respondent, by its letter, unlawfully created the impression that its employees' activities on behalf of Local 32B-J were under surveillance, in violation of Section 8(a)(1) of the Act.

I also find Respondent's statement contained in Item 2 of the July 1 issue of "Plain Talk," that Local 32B-J "will most likely cost us your jobs" unlawfully threatened Respondent's employees with job loss. As set forth above, the Board evaluates such messages from employers, not in isolation from each other, but in their "total context," *Madison Kipp Co.,* supra, *Arch Beverage Corp*., supra., under the standards established by the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, supra.

Here, Respondent failed to provide any objective basis for that statement and failed to explain just how changing their union from NOITU to Local 32B-J could cost them their jobs. Additionally, Respondent published this issue of the newsletter in the midst of its commission of numerous violations of both Section 8(a)(1) and (3) of the Act. Further the issue of "Plain Talk" was attached to the employees' paychecks, indicating that the words in the newsletter were somehow tied to their pay. Thus I find that evaluating Respondent's words in their total context leads to no other conclusion other than that Respondent was threatening its employees with job loss if they voted in Local 32B-J. Accordingly, I find that this action violated Section 8(a)(1) of the Act.

The September 22, issue of "Plain Talk" states that Local 32B-J told the Board that many of Respondent's employees were undocumented and it is creating problems for hardworking Hispanic people, and that Local 32B-J is trying to get the INS to threaten Respondent's employees. By publishing this reckless and irresponsible and untruthful statement, and attaching the newsletter to employees' paychecks, Respondent patently conveyed to many of its undocumented employees that Local 32B-J has put them in imminent danger of both discharge and deportation. The Board has found this type of conduct to have "crossed the line and exceeded the zone of privileged free speech and constituted coercive conduct in violation of Section 8(a)(1) of the Act. See *6 West Limited Corp.*, 330 NLRB 527, 545 (2000) (Employer propaganda falsely accusing the union of making a bomb threat found to have unlawfully disparaged the union). Thus, these statements provide additional indicia of just how deep Respondent's animosity towards Local 32B-J runs.[3]

[3] Although not specifically alleged in the consolidated complaint, the Regional Director for Region 29 alleged these very same statements in the consolidated complaint in *North Hills Office Services, Inc*., Cases. 29–CA–25930 and 29–CA–25996 to be "false, reckless and disparaging remarks regarding an alleged attempt by Local 32B-J to report employees to the INS to deter employees from supporting that labor organization" in violation of Sec. 8(a)(1) of the Act.

Respondent Violated Section 8(a)(1) and (3) of the Act by Discharging Pilar Gutierrez, Failing to Adequately Repudiate the Discharge, and Reducing Gutierrez' Discharge to an Unlawful Written Warning

To violate Section 8(a)(3) of the Act, an employer's conduct must discriminate in a manner that discourages membership in a labor organization. Under *Wright Line,* 251 NLRB 1083 (1980, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.,* 462 U.S. (1983), the General Counsel has the initial burden of proving that union activity or other employee conduct protected by the Act was a motivating factor in an employer's decision to take adverse action against an employee. A prima facie case of discriminatory conduct under Section 8(a)(3) of the Act requires evidence of the following: (1) that the alleged discriminatees be engaged in union activity; (2) that the employer had knowledge of these activities; (3) that the employer's actions were motivated by union animus; and (4) that the discrimination has the effect of encouraging or discouraging union membership. *Downtown Toyota,* 276 NLRB 999, 1014 (1985), citing *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983) *Wright Line,* supra. Once the General Counsel meets this initial burden, the employer then has the burden to show that it would have taken the same action even in the absence of the protected conduct. *Office of Workers Compensation Programs v. Greenwich Colleries,* 114 S.Ct. 2552–2558 (1994); *Southwest Merchandising Corp.,* 53 F. 3d 1334 (D.C. Cir. 1995) ; *Manno Electric,* 321 NLRB 278, fn. 12 (1996); *Wright Line,* supra. However, when an employer's motives for its actions are found to be false, the circumstances may warrant an inference that true motivation is an unlawful one that the employer desires to conceal. *Limestone Apparel Corp.,* 255 NLRB 722 (1981); *Golden Flake Snake Foods,* 297 NLRB 594 fn. 2 (1990).

Here, Gutierrez engaged in major, known union activity. She was Local 32B-J's lead organizer and was very vocal about it, having spoken out on behalf of Local 32B-J at employees meetings with supervisors present, and at the press conference/rally occurring *on the very same day* of her discharge. Hence, not only did she engage in an abundance of union activity, but the timing of her discharge, on the night after the rally, and the unlawful conduct, described above raises serious suspicion as to Respondent's motivation for discharging her.

Additionally, striking evidence of animus and unlawful motivation is established by the fact that no Respondent official ever conducted a fair investigation into the reasons behind Gutierrez' depositing paychecks made out to Virginia Bonilla, on behalf of her son, the alleged reason for her discharge. The Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in finding discriminatory motivation. *Johnson Freightlines,* 323 NLRB 1213, 1222 (1997): *Publishers Printing Co.,* 317 NLRB 933, 938 (1995); *Emergency One, Inc.,* 306 NLRB 800, 807 (1992) (supervisor's failure to adequately investigate accusation of theft by antiunion employees against leading union employee organizer revealed an investigation designed not to find out what occurred, but to support a dis-

charge.) Here, Matos admitted that he discharged Gutierrez without ever asking Gutierrez' supervisor, Hernandez, who was present when Gutierrez was discharged, what he knew about Gutierrez' reasons for depositing Virginia Bonilla's paychecks. Pellegrino explained that it was *only after* Matos discharged Gutierrez that he investigated and found out that Hernandez knew all about what Gutierrez was doing and had allowed it.[4] In fact, Herrera admitted that Virginia Bonilla herself gave her permission for the arrangement. Thus, Respondent's actions, in jumping the gun regarding her discharge, point to an unlawful motivation for Gutierrez' discharge and contribute to an overwhelming prima facie showing in favor of a violation.

The burden now shifts to Respondent to demonstrate that it would have discharged Gutierrez even in the absence of her protected conduct. *Wright Line*, supra. I find Respondent has wholly failed to meet this burden.

Respondent claims that it discharged Gutierrez for fraudulently endorsing a check with another person's name. However, the evidence established that both Hernandez and Herrera, admitted, Section 2(11) supervisors and agents of Respondent, were aware that this situation was occurring and condoned it for months. In fact, the evidence is clear that Herrera himself orchestrated the scenario that enabled Gutierrez' son to work for Respondent unlawfully, using the name "Virginia Bonilla" and Hernandez was the one who originally instructed Gutierrez to deposit the checks into her own bank account. Further, it stands to reason that since it was common practice for undocumented employees of Respondent to work under names other than their own, it is also common practice for these employees to deposit checks into their accounts made out to the individuals whose names they were working under. The evidence is overpowering, and I find that Gutierrez was clearly discharged because of her support for and activities on behalf of Local 32B-J, in violation of Section 8(a)(1) and (3) of the Act.

Respondent argues that since it immediately reinstated Gutierrez the following day, and since she suffered no loss in pay as a result of her discharge, Respondent should not be liable for its violation of the Act. However, the Board has consistently held otherwise. The Board has held that in order to effectively repudiate unlawful conduct, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct" and "free from other proscribed illegal conduct." *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), citing, *Douglas Division*, 228 NLRB 1016, 1024 (1977). In this regard, the Board in *Passavant* clarified: "[T]here must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. And finally, . . . such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. Supra at 138–139.

Applying the above criteria to the instant facts I conclude that Respondent failed to adequately repudiate Gutierrez' discharge. Respondent's repudiation of Gutierrez' discharge was neither unambiguous nor free of other proscribed conduct. In this regard, Pellegrino merely handed Gutierrez a letter and told her she could return to work. The letter simply stated, "Based on further investigation, the Company is rescinding your discharge and offering you immediate reinstatement." This letter is not specific in nature to the coercive conduct and fails to give assurances that in the future, Respondent will not interfere with Gutierrez' Section 7 rights.

Moreover, I conclude that Respondent's actions were not free from other proscribed conduct. In this regard, Matos's explanation to Gutierrez that he did not realize he could not fire her without giving her "notices" or "warnings", indicated to Gutierrez that her discharge was being reduced to a warning and this warning could contribute towards her eventual discharge. Thus, Respondent's reinstatement of Gutierrez did not nearly suffice to repudiate Gutierrez' discharge. Accordingly, I conclude that the discharge and the warning to which the discharge was reduced violated Section 8(a)(1) and (3) of the Act.

Matos' Implied Threat of Bodily Harm to Gutierrez was Coercive and Violated Section 8(a)(1) of the Act

The evidence also established that Matos' statement to Gutierrez regarding how the situation would have been resolved had they been in El Salvador, described above ". . . and sometimes even die . . ." clearly had no purpose but to harass and to illicit fear in Gutierrez. Thus, I find the statement was coercive and violated Section 8(a)(1) of the Act.

Respondent Violated Section 8(a)(1) and (3) of the Act by Issuing Guevara a Written Warning and Discharging Him, and it Violated Section 8(a)(1) of the Act by Requiring Guevara to Produce Documents Establishing He was Legally Entitled to Work in the United States

As set forth above, the Board requires that the General Counsel first establish a prima facie case sufficient to support an inference that protected activity motivated Respondent's issuance of discipline. *Wright Line, supra*. Guevara is a lead Local 32B-J supporter whose attendance at both the Taco Bell meeting and the rally/press conference was made known to Respondent. Additionally, as set forth above, there is an abundance of evidence that establishes Respondent harbored animosity against both the Union, by virtue of the numerous independent violations of Section 8(a)(1) of the Act, and against Guevara, by virtue of Matos' inquiries to Guevara as to why he drove the employees to the Local 32B-J meeting. The timing of the discipline, in the midst of Local 32B-J's organizational campaign and a few days after Guevara was seen at the Taco Bell meeting and questioned about his attendance at that meeting, lends serious suspicion as to Respondent's motivation behind issuing Guevara this discipline. I find the evidence established a strong prima facie showing in support of violations alleged above.

[4] At trial, the following exchange took place:

General Counsel: But you didn't think to ask Ronnie while—while the situation was going on and Pilar was being discharged, if he knew anything was going on as his—as her immediate supervisor and the one who was giving the checks out each week?

Matos: No. I didn't ask that.

The burden now shifts to Respondent to demonstrate that it would have taken these actions even in the absence of Guevara's protected activities. *Wright Line*, supra.

This issuance of a warning notice in retaliation for union activities is a violation of Section 8(a)(1) and (3) of the Act. *Property Markets Group, Inc.*, 339 NLRB 199 (2003). The written warning Respondent issued to Guevara on June 24, 2003, stated Guevara was not doing his job well. However, Guevara testified that prior to that night, he had never been warned, either verbally or in writing, that his work was deficient in any way. Importantly, although Herrera claimed Guevara's supervisor, Laticia Herrera, gave Guevara numerous verbal warnings prior to issuing this written warning. Respondent failed to present *any* evidence to support this claim. In this regard, Respondent failed to call Laticia Herrera as a witness, despite the fact that Laticia Herrera would have been the only individual who could have directly testified as to any alleged verbal warnings she gave to Guevara concerning his performance. In these circumstances, an inference must be drawn that any testimony given by Laticia Herrera would fail to have supported Herrera's claim that prior verbal warnings were issued to Guevara. *Hudson Moving and Storage Co., Inc.*, supra.

Respondent's disparate treatment of Guevara is further evidence of Respondent's pretextual motivation in issuing Guevara the June 24 warning. In this regard, Respondent's controller, Mindy Levy, testified that when there is a problem with an employee's performance, the employee's supervisor always speaks to the employee first and discusses the matter with the employee, prior to Respondent issuing the employee a written warning. However, the credible testimony established that no such prior discussions took place with regard to Guevara's job performance. Thus, I find this unsupported warning has been shown to be totally pretextual and discriminatorily conceived. The evidence supports only a finding that the real reason Respondent issued Guevara this warning was because of his support for Local 32B-J. Accordingly, I conclude was in violation of Section 8(a)(1) and (3) of the Act.

Respondent requested that Guevara provide legitimate working papers, for the first time since he began working for Respondent in October 2002, in the midst of Local 32B-J's organizing campaign and after obtaining knowledge of Guevara's activities in support of Local 32B-J. This establishes clear evidence of unlawful motivation. Respondent's affirmative defense that it was acting pursuant to its obligations under the federal immigration law is laughable.

Respondent not only hired Guevara without requiring him to complete an employment application and without asking him to present *any* work authorization papers at all, but also condoned Guevara's working without any legal work authorization for *9 full months* thereafter. Herrera admitted that Hernandez hired Guevara without any work authorization documents, under a false name, and that he found out about the situation a month after Guevara was hired. Herrera also let it slip out that when he found out about Guevara's unlawful employment, he told Matos about it, although Matos feigned not learning about this until June 16, 2003. Thus, the evidence showed that both Herrera and Matos were aware that Guevara was working without legal authorization from around November 2002, until June 24, 2003 *and did not say a word about it.*[5] The evidence showed that it was only after Local 32B-J began organizing a few weeks before that, and Guevara came out as a lead Local 32B-J organizer, that Respondent all of a sudden became interested in perfect compliance with the immigration laws.

It is clear that this request was pretextual, to set Guevara up to discharge him. Bozzi credibly testified that Ronnie Hernandez forewarned Bozzi in the Taco Bell parking lot that *since the workers had begun organizing for Local 32B-J*, there were "a lot of changes that were [going to be] coming down." Hernandez explained that there was "a lot of pressure from the top and there was going to be a big crackdown on 'papeles de immigracíon' or immigration papers." Sanchez, who was sequestered and did not hear Bozzi's testimony, supported Bozzi's testimony in this regard, stating: "Ronnie said that North Hills was going to start getting rid of undocumented workers." Since Hernandez was not called as a witness by Respondent, an inference must be drawn that Hernandez' testimony would not have supported Respondent's case in this regard. *Hudson Moving and Storage Co., Inc., supra*. I find the evidence clearly established that Respondent formulated its plan to get rid of Guevara *as a direct result* of the commencement of Local 32B-J's organizing campaign at Respondent's facilities.

Moreover, aside from Guevara, Labrador, and Walter Gutierrez, all lead employee organizers for Local 32B-J, Herrera could name *no* other employee who it asked to submit work authorization papers at any time, although employees had always worked for Respondent without authorization papers. Thus, there was obvious disparate treatment here.

Taking into account the total context in which the request for Guevara's documents was made, noting the suspicious timing of these requests, Respondent's prior casual attitude regarding immigration documents, prior to Local 32B-J's organizational efforts, the disparate treatment, and the contemporaneous 8(a)(1) violations, I find that Respondent's demand that Guevara provide it with documentation establishing that he was legally entitled to work in the United States was motivated by anti-Local 32B-J animus in violation of Section 8(a)(1) of the Act. See, *Michael's Painting, Inc. & Painting L.A., Inc.*, 337 NLRB 860, 868 (2002). (The Board found that the employer violated Section 8(a)(1) where, prior to employee picketing,

[5] ALJ: And did you at any time demand and look, if he doesn't have working papers he can't work; did you ever say that?

Herrera: I said that.

ALJ: But he kept working.

Herrera: And Ronnie went back to him to tell him and he said that his papers hadn't processed and he will get his paper[s] right away.

ALJ: But he was hired that way and although . . . Balmore was working and earning money for the work that he did, he was paid under a woman's name that was an employee and wasn't working at that time and not entitled to any money.

Herrera: Correct.

ALJ: So you were issuing checks to somebody who was not entitled to these checks and giving them to somebody who was not entitled to that money under a different name; is that correct?

Herrera: Yes.

Respondent freely allowed false documentation, but after employee picketing, it demanded documentation of authorization to work in this country.)

As set forth above, General Counsel's prima facie showing that Guevara's discharge was unlawfully motivated is very powerful, taking into account Guevara's status as a lead employee organizer, his activities on behalf of Local 32B-J and Respondent's knowledge of them, the animosity that Respondent has exhibited against both Local 32B-J and Guevara, the suspicious timing of his discharge, occurring a month after Local 32B-J's organizing campaign commenced, and Respondent's condonation of not only Guevara's, but countless other employees' illegal working status in the past.

Respondent's affirmative defense that it was required to discharge Guevara once it found out he was not legally entitled to work in the United States is in direct contradiction to the record evidence. The Board has stated, "Where an employer hires an employee with knowledge that he is not legally entitled to work in the United States, it cannot assert that it would have terminated the employee on the basis of his immigration status." *Met Food,* 337 NLRB 109, 112 (2001); *A.P.R.A. Fuel Oil buyers Group,* 320 NLRB 408, 416 (1985); *Country Window Cleaning Co.,* 328 NLRB 190 fn. 2 (1999). In Guevara's case, Respondent admits not only that Hernandez, a Section 2(11) supervisor, hired Guevara despite the fact that at the time he was hired, he provided no papers whatsoever establishing he was legally entitled to work in the United States, rather the evidence also established that Hernandez himself orchestrated the arrangement allowing Guevara to work under a false name, Irma Guevara, and to be paid illegally by Respondent under that false name. In this regard, Guevara credibly testified that when he arrived to work on his first day back in October 2002, Hernandez said to him, "You are going to work under the name Irma Guevara."

The evidence also established that this type of arrangement was commonplace at Respondent for years and changed only when Local 32B-J began organizing at Respondent. For example, Herrera admitted that Respondent knowingly hired Virginia Bonilla under the false identity of Gema Paula. The documents in Paula's personnel file confirm this. It also knowingly hired Pilar Gutierrez under the false identity of Sandra Campos despite the fact that there was some "suspicion" concerning the identification Gutierrez originally submitted. The evidence also disclosed numerous other employees were hired by Respondent using false identification including: Rosa Hernandez a/k/a Yesika Romero and Elisa Membrano a/k/a Sulma Contraras. It is noteworthy that in none of these cases did Respondent reject the employees' original fake identifications and it hired all of them any way. Further, in none of these cases did Respondent discharge the individuals when it discovered they had used false identification to get hired.[6] It was not until Local 32B-J began organizing Respondent's employees in May 2003 that the lead employee organizers began to get fired, under the guise of Respondent's concern for complying with its obligations under the immigration laws.

Herrera's contention that numerous employees have been discharged for not possessing valid work authorization papers was shown to be an outright lie. In response to General Counsel's subpoena *duces tecum* requesting Respondent to produce documents showing all employees who were discharged within the last 3 years for not having appropriate working papers, Respondent produced *not a single* document . Levy conceded that she knows of *no other* employees who were discharged for not possessing valid paperwork. The only examples of employees discharged for not having valid work authorization that anyone could name were Guevara and Walter Gutierrez, two of Local 32B-J's staunchest supporters.

The facts of this case are markededly similar to those found in *Victor's Café 52, Inc.,* 321 NLRB 504 (1996). In that case, when an employee began working for the employer, he had none of the required documents from the Immigration Department that would have made his employment lawful, and the employer demanded none. However, on the same day that Respondent learned that the employee had signed a union authorization card, it demanded to see the employee's social security card and immigration papers, and thereafter, discharged the employee. The Board found, "Considering the numerous 8(a)(1) violations already found evidencing a clear union animus, together with the timing here, [the employer's defense that it had to comply with the immigration laws] can best be described as transparent. As stated above, although employers are legally obligated to be sure that their employees are properly documented, they cannot use the immigration statutes as a means of discriminating against its employees because of their union activities." Id. At 514.

The evidence clearly establishes that Respondent's defense is similarly transparent, considering the numerous 8(a)(1) violations here, the suspicious timing, the condonation and the evidence of extreme anti-Local 32B-J animus. Accordingly, I find Respondent's discharge of Guevara is a clear violation of Section 8(a)(1) and (3) of the Act.

Respondent's Issuance of Three Written Warnings and a 3-Day Suspension to José Labrador Violated Section 8(a)(1) and (3) of the Act

Labrador's activities on behalf of Local 32B-J, included driving all the employees to the Taco Bell meeting and being one of Local 32B-J's most outspoken supporters. Respondent had knowledge of these activities. The timing of the acts of discipline imposed on Labrador, including all three warnings and the suspension, within days of the Taco Bell meeting, establish an unlawful motivation for Respondent's commencement of a campaign of discipline aimed at Labrador. In this regard, Labrador informed Respondent that he had given his name to Local 32B-J on May 8, and he was seen at the Local 32B-J meeting on June 13. A mere 10 days after the Taco Bell meeting, Respondent issued Labrador the first of several warnings. I conclude these facts support a finding that General Counsel has established a strong prima facie case that all of the discipline issued to Labrador, including the warnings issued on June 23, June 24 and August 1, and the 3-day suspension issued

[6] It is noteworthy that at the time Gutierrez was hired under the name Sandra Campos, she had not yet been branded as the lead employee organizer for Local 32B-J.

on June 24, were in retaliation for his activities on behalf of Local 32B-J. *Wright Line*, supra.

The burden now shifts to Respondent to demonstrate that it would have issued all of the above-described discipline to Labrador, even in the absence of his protected activities. *Wright Line*, supra. As set forth below, Respondent has failed to even come close to meeting its burden.

Respondent's defense to this allegation is that it issued this warning to Labrador because Labrador "keeps on showing up later than 6:00 p.m." Labrador does not dispute this and admits he has arrived late to work often in the past. Labrador testified that he always signed in with the correct time, and therefore, management was always made aware of past instances when Labrador arrived late for work.[7] In fact, Matos admitted that Respondent condoned Labrador's constant latenesses for *7 full years* without ever issuing Labrador *any* written warnings. It was not until Labrador became a lead supporter of Local 32B-J that Respondent commenced a campaign of discipline aimed at Labrador.

The record is replete with instances of disparate treatment with regard to the discipline here. Herrera testified that Respondent always gives verbal warnings first for instances involving lateness. However, Labrador credibly testified that he never received any such verbal warnings in all his years working for Respondent, and Matos himself admitted that he never spoke to Labrador about his latenesses at any time before this written warning was issued.

Additionally, it is undisputed that *not one* of the eight other employees who rode to work with Labrador on June 23, 2003, and who signed in at the same time he did, received any discipline for their lateness on that day or at any other time. The warnings submitted by Respondent, covering the time frame of 2001–2004 establish that none of these employees, many of whom, had been traveling to work with Labrador for years, were issued any warnings, either verbally or in writing. Thus, this evidence of disparate treatment severely undermines Respondent's defense that the warning was justified based on Labrador's actions. I find Respondent has failed to rebut General Counsel's prima facie case, *Hanson Aggregateo Central, Inc.*, 337 NLRB 870 (2002), and conclude that by issuing the June 23 warning letter, Respondent violated Section 8(a)(1) and (3) of the Act.

Respondent's Issuance of a Written Warning and 3-Day Suspension to Labrador on June 24, was Unlawfully Motivated and in Violation of Section 8(a)(1) and (3) of the Act

Respondent's defends its issuance of the warning and suspension issued to Labrador on June 24, by contending it was justified due to Labrador's actions on that day. However, the record evidence establishes otherwise. It is abundantly clear that by issuing Labrador the June 24 warning and suspension, Respondent strayed far from its well established past practices of allowing employees to talk to each other during working time and hours, and issuing a minimum of three written warnings for such violations before suspending employees. Additionally, Respondent's actions in failing to adequately investigate the matter prior to making its determination to suspend Labrador and in singling Labrador out of the group of employees involved and disciplining only him, evidenced that the true reason for its issuance of the written warning and suspension on June 24 was not because his behavior at the supply closet, but rather, was because of his support for Local 32B-J.

By issuing Labrador this warning, Respondent veered from its admitted practice of allowing its employees to talk freely to one another during working time. In this regard, Herrera stated, "If employees are mopping and cleaning and talking to one another while they are mopping, and it's not affecting their jobs, there is no policy against talking while working." Herrera further admitted that Respondent has no restriction against employees talking while waiting on line to get supplies, and Labrador testified that he previously had engaged in similar conversations all the time. Respondent's own witness, Rene Iraheta, who was the only supervisor present during the incident in issue, stated Labrador's actions leading up to the warning and suspension consisted of taking part in a conversation in front of the supply closet. Having been the only supervisor present during the incident, I credit Iraheta's recollection of what happened over Matos' and Herrera's who I found to be untruthful witnesses, and whose testimony in this regard was based solely on hearsay. Thus, I find the evidence is quite clear that Labrador's actions did not violate any of Respondent's established past practices.

Iraheta also testified that Labrador had a 5 minute conversation with employees by the supply closet, and was talking to them about Local 32B-J. In this regard, Iraheta testified that he told Herrera "there was some kind of discussion there with respect to the Union." Matos testified: "[W]hen he's downstairs getting the stuff, he's not to hold the cleaners to talk about his propaganda" and "they don't want to hear that stuff. They don't want to hear it." Even assuming that was true and Labrador was soliciting the others to join Local 32B-J, Respondent presented no evidence establishing that it maintained a valid no solicitation rule at its facility. The *only* similar warnings Respondent was able to locate for solicitation were issued to Sandra Hernandez and Maria Mendoza on July 1, 2003. However, Respondent's issuance of these two warnings was found to be an unfair labor practice in Case 29–CA–25930. Thus, although Respondent contends that what Labrador was doing was a violation of its rules, it hasn't shown that it acted lawfully and, as a regular practice, disciplines employees for similar conduct.

Moreover, Respondent failed to show that it issued Labrador three warnings prior to suspending him. Matos first testified that Respondent is required to issue three warnings to an employee before it can suspend or discharge the employee. Matos then contradicted his testimony and testified that Respondent's practice was to suspend an employee without issuing them *any* prior warnings for violations such as conversing outside the supply closet. The June 24, warning itself indicates otherwise. In this regard, Herrera and Matos, who signed the warning, thought it was important to note on that warning, "*This is your third warning."* I find that those words would not have been inserted onto the warning had they contained no importance.

[7] Respondent failed to comply with General Counsel's request in its Subpoena Duces Tecum for all the sign in logs from 2001–2004, which would have supported Labrador's testimony in this regard.

Moreover, Labrador credibly testified that Herrera told him that because he had three warnings, Labrador had to leave.

Respondent was totally unable to establish that three prior warnings were issued to Labrador prior to his suspension. In this regard, although Labrador was issued one written warning for lateness the day before, his first in 7 years of employment with Respondent, and if the written warning he received the next day for conversing outside the supply closet is considered another warning, Labrador's file is still devoid of any mention of a third such written warning. Although Herrera told Labrador that he had given him warnings "way before" when Labrador was still working in 445, Labrador's personnel file contains no mention of *any* such earlier warnings. When questioned further, Matos blurted out that he had no idea when the first warning relied upon in issuing Labrador the suspension was issued, stating, "I don't know when, but he was notified before."

Respondent's records show that Respondent has an established practice of issuing its employees numerous written warnings without ever taking the drastic action of suspending employees. For example, the records provided by Respondent disclosed that Antonia Pereira was issued five written warnings in 2 years, three for insubordination, and one for a no call/no show and one for faulty work, without ever being suspended. Gerard Joseph was issued four written warnings in 1½ years, one for insubordination and three for unexcused absences, without ever being suspended. Beatrice Gonzalez was issued at least four written warnings, three or four for leaving her work post and one for a no call/no show, and three verbal warnings, without ever being suspended. Both Xiomara Vilchi and Carlos Martinez were each issued four written warnings, without being suspended, prior to being discharged. Dysna Erita was a no call/no show for almost an entire month before Respondent issued her a written warning. This written warning to Erita, dated January 31, 2001, states, "should you receive several warning notices, it can be grounds for dismissal," thus indicating that several warnings would be necessary prior to Respondent taking any drastic actions such like dismissal.

Herrera admits that in all the time he has worked for Respondent, Respondent has *never* before suspended an employee for allegedly disrupting other employees. Thus, it is clear that by suspending Labrador for 3 days after receiving his very first written warnings in his seven prior years of employment, Respondent deviated from its prior practice of issuing several warnings without ever suspending. Additionally, the record evidence established that the discipline imposed upon Labrador for conversing outside the supply closet that day was unduly harsh, to say the least. In fact, Levy admitted that if an employee was waiting on line for supplies and was talking to other employees as he waited, *he would not deserve to be suspended.*

To add on to the many reasons why this warning was clearly pretextual, is the fact that, again, Respondent both failed to adequately investigate the matter prior to making its determination to suspend Labrador and singled out Labrador out of the group of employees involved in the incident, disciplining only him. With regard to Respondent's utter failure to properly investigate the incident at hand, Herrera stated that all the information contained in his report written on June 24, came from supervisor Rene Iraheta. Herrera concedes that he never bothered to speak to Labrador, or any of the other workers involved before handing in his report and issuing the discipline to Labrador. The Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in finding discriminatory motivation. *Johnson Freightlines,* supra*; Publishers Printing Co.,* supra; *Emergency One, Inc.*, supra. I find that by issuing Labrador both a written warning and a 3-day suspension for his participation in an incident involving employees to whom Respondent never even bothered to speak, establishes its action were pretextual.

Finally, the evidence further establishes disparate treatment. In this respect, Respondent freely admits that there were at least three or four employees involved in the alleged argument on June 24, which served as the impetus for issuing Labrador the written warning and 3-day suspension on that same day. However, Respondent also acknowledges that only Labrador received any discipline for the incident that occurred on that evening, despite the fact that Iraheta testified that he told Herrera and Matos that *all* of the employees, including one named Edgar Osombia, were arguing at the time. The Board recognizes that an inference of unlawful motivation may be drawn from evidence of blatantly disparate treatment. *Meritor Automotive, Inc.*, 328 NLRB 813, 816 (1999); *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998). I find the evidence of disparate treatment in this instant case provides a powerful indication that Respondent's issuing Labrador a warning and a suspension on June 24, 2003, was unlawfully motivated. I conclude Respondent has utterly failed to meet its burden under *Wright Line, supra*. Accordingly, I conclude that the June 24 written warning and 3-day suspension were in violation of Section 8(a)(1) and (3) of the Act.

Respondent's defends its issuance of the written warning to Labrador on August 1, by claiming that the warning was in response to a tenant complaint about Labrador's work. In this regard, Levy testified that whenever there is a problem with an employee's performance, the employee's supervisor always speaks to the employee about the problem prior to issuing the employee a written warning. However, Labrador credibly testified that at no time did anyone from Respondent ever mention a word to him about tenant complaints about his work performance. Levy's testimony support's Labrador's on this point. She testified that if a supervisor had spoken to Labrador about problems with his performance prior to the issuance of this warning, there would most likely be a notation about this talk in Labrador's personnel file. No such notation could be found in Labrador's personnel file. Additionally, Levy testified that had she been made aware of a supervisor's prior discussions with Labrador about his performance, she would have mentioned this fact in the August 1 warning letter. Nothing about prior verbal discussions or warnings is contained in the August 1, written warning. Thus, I find that, although it is a conceded past practice for Respondent to speak to its employees about a problem with their performance prior to issuing a written warning, Respondent strayed from this practice in Labrador's case, by issuing him the August 1, warning without first notifying

him of the problem and giving him an opportunity to improve. In fact, Labrador's immediate supervisor, Rene Iraheta, gave only compliments to Labrador, stating that Labrador did "good work" for him. I find the blatant disparate treatment by Respondent provides a strong indication of pretext. *Meritor Automotive, Inc.*, supra; *New Otani Hotel & Garden*, supra.

Further, although Labrador was not the only employee responsible for cleaning First Data's kitchen floor, Labrador, once again, was the only employee disciplined for not cleaning the kitchen properly. Indeed, Matos's testimony that no one else is responsible for cleaning First Data's kitchen floors *at any time* is completely implausible. It makes no sense that Respondent would not assign other employees to clean those floors on the occasions that Labrador is unable to do so because of other assignments or absence. In fact, Labrador credibly testified that between June 14 and August 1, 2003, when Labrador was called to clean other buildings, floaters cleaned the floors of 265 more than 20 times. Thus, it is not clear that Labrador was solely responsible for First Data's problems, or that he was responsible for them at all. I conclude, Respondent has not satisfied its *Wright Line* burden with regard to issuing this written warning to Labrador. Accordingly, I conclude Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act, I find Respondent must be ordered to cease and desist therefrom, and take affirmative action designed to effectuate the policies of the Act.

With respect to the violations of Section 8(a)(1) described above, I will set forth in the Order that Respondent must therefore cease and desist therefrom. I will also set forth in the Order that Pilar Gutierrez and José Labrador be made whole for all monetary losses that they may have incurred as a result of Respondent's unlawful conduct. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed in *for the Retarded*, 283 NLRB 1173 (1987).

I will also set forth in the Order that Respondent expunge from its records any references to the unlawful discipline and discharges, set forth above.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, North Hills Office Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees, suspending its employees, issuing its employees warnings, or imposing any other discipline in order to discourage its employees because of their membership in, or activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

(b) Demanding that its employees provide birth certificates, social security cards or any other documents establishing that they are legally entitled to work in the United States solely to discourage their membership in, or activities on behalf of the Union, or any other labor organization.

(c) Impliedly threatening to discharge its employees, or to threaten harm, or in any other manner to discourage its employees support for their membership in or activities on behalf of the Union, or any other labor organization.

(d) Interrogating its employees about their activities on behalf of or their attendance at meetings held by the Union, or any other labor organization.

(e) Surveilling its employees or giving the impression of surveillance of their activities on behalf of the Union, or any other labor organization.

(f) Interrogating its employees about their complaints about their job and or promises to remedy such complaints in order to discourage their support for the Union or any other labor organization.

(g) Directing its employees not to speak to representatives of the Union, or any other labor organization.

(h) Threatening its employees that their terms and conditions of employment will not change if they select the Union, or any other labor organization, as their collective bargaining representative.

(i) In any like or related manner interfere, restrain, or coerce its employees in the exercise of their rights guaranteed by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order make whole Pilar Gutierrez by removing from our records any reference to her discharge on July 1, 2003, and to any warnings to which this discharge was reduced.

(b) Within 14 days of this Order make whole José Labrador for his unlawful suspension, in the manner set forth in the Remedy provision of this Decision, and remove from our records any reference to the suspension issued to him on June 24, 2003, and the warnings issued to him on June 23, 24, and August 1, 2003.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its principal office and place of businesses located at 244 Crossways Park Drive West, Woodbury, New York and at its other facilities located at 265 Broad Hollow Road, 425 Broad Hallow Road and 445 Broad Hollow Road, copies of the attached Notice marked "Appendix"[9] in both English and Spanish. Copies

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

of the Notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since May, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated September 15, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

Therefore, we assure you:

WE WILL NOT fire you, suspend you, issue you warnings or impose any other discipline upon you to discourage your membership in or activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT demand that you provide us with birth certificates, social security cards, or any other documents establishing that you are legally entitled to work in the United States solely to discipline you for your activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT impliedly threaten to fire you or threaten to harm you in any manner to discourage your support for or activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT question you about your activities on behalf of or your attendance at meetings held by Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization

WE WILL NOT spy on you or give you the impression that we are spying on your activities on behalf of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT ask you to tell us about complaints you have concerning your job and promise to remedy them in order to discourage your support for Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization.

WE WILL NOT direct you not to speak to representatives of Service Employees International Union, Local 32B-J, AFL–CIO, or any other labor organization

WE WILL NOT threaten you that your terms and conditions of employment will not change if you select Service Employees International Union, Union, Local 32B-J, AFL–CIO, or any other labor organization, as your collective bargaining representative.

WE WILL NOT in any like or related manner frustrate your exercise of any of the rights stated above.

WE HAVE reinstated Pilar Gutierrez and we will make whole Pilar Gutierrez by removing from our records any reference to her discharge on July 1, 2003, and to any warnings to which this discharge was reduced.

WE WILL make whole José Labrador for any loss of pay he may have suffered as a result of our alleged discrimination against him and will remove from our records any reference to the suspension issued to him on June 24, 2003, and the warnings issued to him on June 23, June 24, and August 1, 2003.

NORTH HILLS OFFICE SERVICES, INC.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."